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No. 04-149

Supreme Court, U.S.
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In The Supreme Court of the United States

DEBORAH BAKER AND RICHARD ENYEART, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

IBP, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondent IBP's (hereafter "IBP") Brief In Opposition (hereafter "Opp. Br.") to the Petition has failed to respond to Petitioners' First Question Presented – whether § 159 of the National Labor Relations Act (29 U.S.C. § 159) precludes Petitioners from suing IBP. By addressing itself to a different question, Fed. R. Civ. P. 19,[1] which was not raised below and is not part of the First Question, IBP tacitly concedes that the Seventh Circuit's holding in this case, that union members cannot sue their employer, is indefensible. It conflicts with every other circuit's case law.

As to Petitioners' Second Question Presented, the split created by the Seventh Circuit's holding that the members of a RICO enterprise must have common "goals," IBP barely takes up the challenge. It contends the case was decided on another RICO question. This is simply not so. The *Baker* court expressly stated the Complaint failed to "specify" a RICO enterprise – a holding that will give every criminal indicted under the statute a strong basis for dismissal.

Finally, IBP says nothing at all about the national crisis caused by untrammeled illegal immigration. This is made all the more apparent by the 9/11 Commission Report. It concluded, "[I]n cities with large immigrant populations . . . [a] large population lives outside the legal framework. Fraudulent documents could easily be obtained. Congress kept the number of INS agents static in the face of the overwhelming problem." Commission Members, *The 9/11 Commission Report*, GOV'T PRINTING OFF. at

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[1] Hereafter the Federal Rules of Civil Procedure shall be referred to as "Rule __."

80-81 (2004). The Seventh Circuit has effectively taken away the one and only tool private citizens have to enforce the immigration laws, civil RICO – a remedy Congress expressly enacted in 1996. The tragic irony of such a decision, and its timing, cannot be overstated. For this reason alone, the Petition satisfies the "important federal question" criteria of Supreme Court Rule 10(c).

1. IBP HAS VIOLATED SUPREME COURT RULE 14 BY FAILING TO RESPOND TO PETITIONERS' FIRST QUESTION

Supreme Court Rule 14 provides that "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." IBP violated this Rule by raising Fed. R. Civ. P. 19, *which was not cited by the Seventh Circuit or the Petition.* We note, too, that Respondent did not file a cross petition. Its new matter is not before this Court.

The Seventh Circuit held Petitioners cannot sue IBP because their union retains the "exclusive" authority to negotiate wages, pursuant to 29 U.S.C. § 159(a) – *not Rule 19.* Pet. App. 11. Thus, the Seventh Circuit's holding conflicts with the Sixth Circuit's holding on this precise question in *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 621 (6th Cir. 2004) (rejecting the *Baker* court's conclusion that the union had such an exclusive right). This split of authority cannot be any clearer and may bar all employee class actions under other statutes such as the Fair Labor Standards Act and Title IX. Accordingly, the criteria for certiorari have been established. Supreme Court Rule 10(a) (a decision is "in conflict with the decision of another United States court of appeals on the same important matter . . .")

2. IBP'S CONTENTION THE UNION IS A NECESSARY PARTY IS IN CONFLICT WITH THE OTHER CIRCUITS

However, if in its discretion the Court considers the new Question Presented as posed by IBP, the split among the circuits is even more pronounced. The proposition that Rule 19 requires joinder of the union in an employee class action has been expressly repudiated time and again. *See Diaz v. Schwerman Trucking Co.*, 709 F.2d 1371, 1375 (11th Cir. 1983) (concluding in an employee action for back pay the union is not a necessary party under Rule 19, relying upon *Vaca v. Sipes*, 386 U.S. 171 (1967), the only authority the Seventh Circuit cited in support of its view of the law); *Social Services Union, Local 535 v. Santa Clara Co.*, 609 F.2d 944, 947 (9th Cir. 1979) (holding that whether a union is adequate to represent a class of employees in a wage rate dispute was a factual question to be determined in a case-by-case basis); *Afro Am. Patrolmen's League v. Duck*, 503 F.2d 294, 298 (6th Cir. 1974) (affirming denial of union's motion to intervene in employee class action); *see generally* 7 Wright et al., *Federal Practice & Procedure*, Civ. 3d, § 1620 (2001) (examining the labor-management decisions interpreting the necessity of the union as a party pursuant to Rule 19).[2]

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[2] The Seventh Circuit has expressly rejected IBP's interpretation of Rule 19 in two class actions. *See Air Line Stewardesses Assn. Local 550, TWC, AFL-CIO v. American Airlines, Inc.*, 490 F.2d 636, 642 (7th Cir. 1973) (holding that union members could replace the union as representative of the employees and resolve claims on their behalf in a class action); *Local 194 Retail v. Standard Brands Inc.*, 540 F.2d 864, 865 (7th Cir. 1976) ("The union does not, however, have standing to seek, on behalf of the class, back pay or other individualized forms of monetary relief," holding that unions may only sue if they have organizational standing pursuant to *Warth v. Seldin*, 422 U.S. 490 (1975)).

In conclusion, IBP's argument that the Seventh Circuit's *per se* requirement that the union be named in an employee lawsuit is contrary to every other circuit. There is no such rule, and Rule 19 has never been interpreted in this manner. As the *Trollinger* court correctly held, there is no *per se* rule either requiring or barring union intervention in an employee lawsuit. This is reflected by Rule 23.2, which expressly authorizes class actions "by or against the members of an unincorporated association as a class action . . ." The Seventh Circuit has effectively repealed the right of Petitioners to sue in this manner. This split, too, might well warrant resolution.

3. IBP HAS MISINTERPRETED THE SIGNIFICANCE OF THE SEVENTH CIRCUIT'S DECISION ON RICO JURISPRUDENCE

IBP devotes the majority of its brief to dissuading this Court that *Baker* held that the Complaint failed to state a RICO claim because it believed IBP and its recruiters could not constitute an association-in-fact RICO enterprise. The Seventh Circuit described the perceived defect as "specification of the enterprise." *Baker*, 357 F.3d at 691; Pet. App. 11. Lest doubt is still posed, the Court declared this defect to be "fatal" to the RICO claim. *Id.* IBP devotes most of its brief in support of its view that the fatal flaw in the RICO claim was something else entirely – that IBP was alleged to be both the 'person' and the 'enterprise.' Opp. at 14 (asserting that the dismissal was because "IBP was both the RICO person and the only RICO enterprise . . .") (internal quotations omitted). Yet, IBP fails to explain how this alleged pleading defect can be characterized as the failure to "specify" a RICO enterprise. IBP takes this tack because it cannot dispute that a legitimate split

exists as to whether the members of a RICO enterprise cannot have "divergent goals." In fact, *Baker* is a radical departure from established RICO jurisprudence. If it is allowed to stand, the statute will no longer be an effective weapon against enterprise criminality. Rather than dispute this, IBP simply asserts the dismissal (but not what it characterizes as "dicta") was actually premised upon a different sub-theory. Will indicted racketeers acquiesce in IBP's interpretation of the Opinion? Petitioners believe these divergent interpretations of the RICO enterprise should be resolved now.

CONCLUSION

For the reasons noted above and discussed in the Petition, the Court should grant the Petition for writ of certiorari.

Respectfully submitted,

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